APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 40
HCA/2020/185/XC

Lord Justice General
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST SENTENCE

by

KEITH RIZZO

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlay QC; Paterson Bell (for Graham Walker Solicitors, Glasgow)
Respondent: Edwards QC, AD; the Crown Agent

18 September 2020

Introduction

[1] On 9 March 2020, after an eleven day trial at the High Court in Glasgow, the appellant was unanimously found guilty of three charges. Chronologically, these were: first (charge 7), a number of relatively minor assaults on Neomi Smith, who was the appellant's 23 year old partner, at their flat in Swan Street, Brechin, in May 2019; secondly (charge 6), on 9 June, behaving in an abusive or threatening manner towards Ms Smith in Hudson's Bar in

the city; and thirdly (charge 9) the murder of Ms Smith later on 9 June, by forcing entry to the flat, inflicting blunt force trauma to her head, compressing her neck and restricting her breathing, and repeatedly striking her on the head and body with knives. Each charge was aggravated by the involvement of the appellant's partner in terms of section 1 of the Abusive Behaviour and Sexual Abuse (Scotland) Act 2016.

[2] On 6 April 2020 the trial judge imposed a life sentence with a punishment part of 22 years. The appeal concerns the length of that part.

Facts

[3] Evidence was led in relation to a number of charges, upon which the Crown ultimately did not seek a conviction, which libelled acts of violence, and other abuse, perpetrated by the appellant on a number of partners from 2014 onwards. Alcohol played a part in these, as it did with the assaults on the night of the murder. The appellant was described by witnesses as jealous, manipulative and controlling. He had a tendency to belittle his partners. Although he often apologised afterwards, the conduct was repeated.

[4] The Angus Agricultural Show took place in Brechin on 8 June. Many of those who had attended went to Hudson's Bar for the evening. There was dancing, during which the appellant became annoyed at the manner in which the deceased was dancing with others. He got up, shouted, pushed a table causing glasses to fall, knocked a bottle across the dance floor and made a sign to the deceased that he was watching her. The deceased was upset and crying. She left the bar, telling a friend that she was afraid because of previous incidents of physical violence. She said that she planned to go back to the flat and lock the door, leaving the key in the lock to stop the appellant entering.

[5] The appellant left the bar with a cousin. They arrived at the appellant's flat at about 00.45am. The appellant kicked the door in. The cousin made a hasty retreat. At 1.22am the cousin, and a number of others in a group, received a message from the appellant saying that the deceased was dead.

[6] The appellant's downstairs neighbour had heard banging noises from the kitchen area of the deceased's flat. These went on for 15 to 20 minutes, with gaps of quiet lasting for about a minute. The neighbour telephoned the police. While waiting for a response, the appellant appeared at his door in a state of apparent distress and panic. The appellant said that his partner was unresponsive, but he had not been able to call the emergency services because he could not find his phone. The trial judge reports that the latter seemed unlikely because the appellant was sending messages from 1.22 to 1.29am and the call to the police, which the neighbour then made, was shortly before the police arrival at the flat at 1.31am.

[7] The neighbour had gone into the appellant's flat where he was met with what he described as a "scene of carnage". There was glass and debris all over the kitchen floor, with the contents of the cupboards and fridge having been strewn about. The deceased was lying on her front with a knife beside her. The appellant and the neighbour went outside to await the arrival of the emergency services. The appellant began shouting that his partner had been stabbed, although one passer-by reported him as saying that he had stabbed "somebody". The appellant threw himself onto the ground and started howling. A friend of the appellant had been driving past and saw the appellant. He telephoned him. The appellant said that somebody had broken into his flat when he was in the shower and had attacked the deceased.

[8] The first paramedic on the scene described the scene as like something out of a horror film. There was a considerable amount of blood on and below the deceased. The

deceased's face was badly bruised, with her eyes like "golf balls". The back of the deceased's neck was like a piece of cheese, ie full of stab wounds. The deceased had suffered 32 blunt force injuries and 26 stab wounds, 20 of which were serious and 10 were to the back of the neck. There had been two attempts to cut her throat. There were no defensive injuries. There was evidence of asphyxiation.

[9] Over time, the appellant gave a number of accounts about what had happened. His first group message at 1.22am was a request for someone to answer because "Neomis been murdered", followed by four broken heart and four sad face emojis. Five minutes later, he sent another message saying "someone's attacked Neomi she's dead". This was followed by pleas for help. At no point did the appellant attempt to phone the emergency services. The appellant's account to his neighbour as they went upstairs to the appellant's flat was that the deceased had been arguing with someone in the kitchen whilst the appellant was taking a shower. The neighbour said that he would have heard the shower if that had been the case. At 1.29am the appellant phoned his brother and said that Neomi was dead. "Someone has been in the flat and stabbed Neomi in the back". At 1.55am he told a friend the same story about someone breaking in while he was having a shower. When the police arrived, he told them that he had been in the shower and had heard a thump.

[10] The appellant was interviewed for over 3 hours, during which he provided an account which varied on a number of matters. He had accepted that he had been angry in Hudson's Bar because of the way in which the deceased had been dancing. He then said that he had made things up with the deceased and they had returned to the flat together and entered using his keys. This was notwithstanding: contrary CCTV images showing the deceased going home alone and the appellant with his cousin; and his cousin's account of the appellant breaking in. The appellant told the police that he had gone for a shower and

had heard a bang followed by a scream. He said that he had a feeling that someone had been watching them as they entered the close. The CCTV images showed that no-one entered or exited the close other than the deceased, the appellant and his cousin during the relevant period.

[11] The appellant did not give evidence. His mother was adduced by the Crown. She said that, when she had visited the appellant in prison, he had given an account of the deceased approaching a car with no number plates some two weeks prior to the deceased's death. There were two masked men in the car. The deceased had told the appellant that she had to talk to the men. She had handed them cash. On the night of the deceased's death, the appellant had fallen out with the deceased. He had walked home with his cousin. The chain was on, but the deceased had told him that he should break the door down if the chain was on because she would not have put the chain on unless something was wrong. The two men were in the flat. They said that the deceased owed them a lot of money. It had been the two men who had assaulted the deceased.

Sentence

[12] The appellant was aged 23 at the time of the murder. According to the trial judge, he showed no sign of remorse during the trial. He maintained his innocence throughout, by advancing the diverse and fanciful accounts which he had repeated to others. That, in the mind of the judge, served only to enhance the suffering which had already been experienced by the deceased's family. Victim impact statements had been lodged and were taken into account.

[13] The appellant had a previous conviction for domestic assault, which had attracted a £500 fine. The Criminal Justice Social Work Report described the appellant's background as

involving his parents separating when he was three years old. When he was 13 his mother went with him to the United States, having reconciled with his father. The appellant returned to Angus when he was 17 and his mother did so too shortly thereafter. There is little of note reported in connection with the appellant's education or employment. He was an occasional cocaine user. The CJSWR described the appellant as emotionally detached when discussing the offence. There was a lack of victim empathy. He had falsely told the social worker that the trial judge had disallowed evidence which pointed to his innocence. He had told the social worker that the deceased's behaviour, during their 11 week relationship, had at times been "disrespectful" and "provocative". He had intended to sort it out.

[14] The trial judge regarded the appellant as a possessive and manipulative young man who expected others within a domestic relationship to conform to his expectations. He was, in short, dangerous. The judge explained that she took into account, in terms of section 1 of the 2016 Act, the aggravation of the murder having been committed in a domestic setting. In her sentencing statement, she said that she would not increase the punishment part "in these circumstances". In her report to the court, she stated (para 38) that she did not enhance the sentences further to reflect the aggravation as she had had regard to the domestic relationship in selecting the punishment part.

Submissions

[15] The submissions on the appellant's behalf recognised the necessity of selecting a lengthy punishment part, even for a person of the appellant's relative youth. Weight ought nevertheless to be placed upon the need for rehabilitation in a person of the appellant's age. As matters stood, he would be in his mid-forties before he could apply for parole. How then

could rehabilitation operate, when a period of 22 years had to pass before the appellant could contemplate a return to society? It was important to provide an offender with some hope of when and how he might contribute to society in the future. Without that, any self-drive to rehabilitate would be diminished.

Decision

[16] This was an exceptionally brutal murder on a young woman who had done nothing other than attempt to enjoy herself on the day of the annual Angus show. The murder was premeditated in the sense that whatever had happened in Hudson's Bar had long since passed before the appellant broke into the flat and attacked his partner. Apart from the relative youth of the appellant at the time, there were no mitigating features. As the trial judge observed, the appellant has shown no remorse. He has maintained his innocence by reporting fanciful accounts in a hopeless effort to conceal his actions. The domestic nature of the attack is, in terms of the 2016 Act, an aggravating feature given the relationship of mutual trust which is assumed to be a part of a social partnership.

[17] In selecting an appropriate sentence, the court normally has to have regard to the prospects of successful rehabilitation, especially in a relatively young man (Scottish Sentencing Council: *Principles and purposes of sentencing*, at para 5). In setting a punishment part of a life sentence, the focus is, however, on determining a period which satisfies "the requirements for retribution and deterrence" (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2(2)). In the current prison and parole regime, and depending no doubt on the offender's attitude and conduct in prison, that rehabilitation will not commence only when the punishment part has expired. It ought to have started, in the form of courses, family and community visits, and ultimately the open prison regime, well in

advance of that date. The process may be a long and gradual one, but its content ought to provide some prospect of reform at a relatively early stage of the custodial term. Whether that will be the position with the appellant remains to be seen.

[18] Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 not only provides that, in circumstances such as the present, the domestic aggravation must be taken into account, it also states that the court must:

> "(5)(d) state –
>
> (i) Where the sentence imposed… is different from that which the court would have imposed if the offence had not been so aggravation, the extent of and the reasons for that difference; or
>
> (ii) Otherwise, the reasons for there being no such difference."

It is not clear that the trial judge has fully complied with this provision in stating simply that she had already taken the whole circumstances into account when selecting the punishment part. There is no written record of the reason for this in the minutes. Although the exercise may be somewhat artificial in some, particularly severe, cases, the statute envisages the court either (i) contemplating what sentence might have been imposed for a similar crime in a non-domestic setting and then increasing it to take account of the aggravation or (ii) explaining why it is not doing so.

[19] Although the punishment part is a severe one, such a sentence is appropriate for this type of brutal killing even by a man in his early twenties (see eg *Davidson* v *HM Advocate* [2019] HCJAC 84 and *Rauf* v *HM Advocate* 2019 SCCR 47). Particular attention must be paid to the domestic aggravation. Having regard to the circumstances, all of which the trial judge took into account, the court is not satisfied that the punishment part can be regarded as excessive. The appeal is refused.